IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 33810

TERESA ESTEP and TERRY ESTEP, her husband,

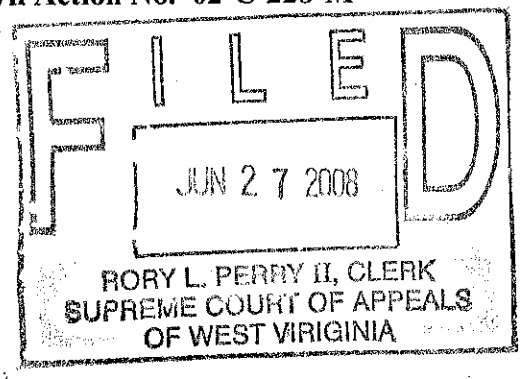
Plaintiff Below and Appellee,

v.

MIKE FERRELL FORD LINCOLN-MERCURY, INC., a West Virginia Corporation, and FORD MOTOR COMPANY, a foreign corporation doing business in West Virginia,

Defendants Below and Appellants.

On Appeal from the Circuit Court of McDowell, County, WV Civil Action No. 02-C-228-M



BRIEF OF APPELLEES TERESA ESTEP AND TERRY ESTEP

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KIND OF PROCEEDING AND NATURE OF THE RULINGS OF THE LOWER TRIBUNAL[1]

This appeal arises from a jury trial conducted in the Circuit Court of McDowell County, West Virginia in November 2006. In that trial, which centered on a failed airbag deployment of a 1999 Ford Ranger truck, the jury heard evidence from two parties, Appellees Terry and Teresa Estep[2] and Appellant Ford Motor Company. Appellant Mike Ferrell Lincoln-Mercury, Inc., who was also a party to the proceedings below did not appear at trial or present evidence.

Following fact and expert discovery and extensive pre-trial proceedings and motions, which included a ruling by the Circuit Court excluding evidence regarding Teresa Estep's ("Teresa") seat belt usage,[3] the trial commenced on Thursday, November 9, 2006, with jury selection. The Court, the jury, the parties, and counsel then returned on November 13, 2006 to hear evidence.

At trial, Appellee Teresa Estep, provided testimony from fact witnesses, treating physicians, and two expert witnesses. Teresa proved, by a preponderance of the evidence, that the 1999 Ford Ranger, in which she was driving when a one-car motor vehicle collision occurred, was not reasonably safe for its intended purpose because its airbags failed to deploy when the Ford Ranger struck a large maple tree head-on.[4] Appellant Ford Motor Company presented testimony only from expert witnesses including a company representative expert.

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[1] Appellee notes that the Appellants violated Rule 3 of the Rules of Appellate Procedure by relying on hyperbole in this part of the brief. For example, to say that the vehicle "went airborne" is beyond even a factual statement. Rather, that is Ford's expert witness theory which the jury rejected, see infra.

[2] Appellee Terry Estep presented only a claim for loss of consortium at trial. The jury decided against awarding Terry Estep any recovery for that claim. Terry Estep is not appealing that finding.

[3] The Circuit Court's rulings on both parties' pre-trial motions are set forth in the Court's Order of January 27, 2006 (Design. Of Record, 9).

[4] As a result of the collision, Teresa sustained a burst or compression fracture of the L-2 vertebrae, bruising, and a concussion. The L-2 fracture required removal of the bone fragments and placement of a cage, screw, and plates.

After hearing all the evidence, including a view of the accident scene and of the Ford Ranger steering wheel and of course considering all exhibits, the case was submitted to the jury, following instructions and closing arguments, on November 20, 2006. On that date, the jury decided in favor of Teresa and awarded her a verdict in the amount of $993,157.50. Pursuant to West Virginia Code § 17C-15-49 (d), and Teresa's stipulation, the trial judge, the Honorable Rudolph Murensky, reduced this amount to $933,157.50.[5] Had Teresa not stipulated to not wearing a seatbelt that issue would have been submitted to the jury. The verdict, made a part of the judgment order (Design. Of Record, 11) expressed that the jury, by a preponderance of the evidence, found the airbag system in the Ford Ranger was defective and was a proximate cause of Teresa's injuries.

Appellants timely filed their post-trial motions for judgment as a matter of law and in the alternative for a new trial. Those motions were argued on March 9, 2007, and were denied by order entered March 14, 2007 (Design. of Record, 16). Appellant's Petition for Appeal was filed on August 14, 2007 and granted by this Court on January 10, 2008.

This appeal identifies four specific rulings by the Circuit Court. First, Appellants Ford Motor Company and Mike Ferrell Lincoln-Mercury Ford argues that the Circuit Court erred when it granted Teresa's Motion in limine which excluded evidence Teresa was not wearing a seat belt. Second, Appellants allege the Circuit Court erred in denying Teresa's motion for judgment as a matter of law. Specifically, Ford states that Teresa failed to show that the Ford Ranger's airbag deployment system was defective. Third, Ford argues that Teresa's expert opinion witness was improperly admitted into evidence. Fourth, Ford argues the Circuit Court erred in instructing the jury when it failed to tell the jury that compliance with a federal safety requirement raised a "rebuttable presumption" that the

[5] By stipulation, when a plaintiff does not contend that failure to wear a seat belt was a proximate cause of injury, the final jury award is reduced by 5%. See W. Va. Code § 17C-15-49 (2008). Also by stipulation in this case, the amount was further reduced to decrease the medical specials to reflect the amount actually paid by third party providers, an issue not raised in this appeal.

product was safe.

Each of the issues raised by Appellants on appeal was thoroughly, and maturely considered by the Circuit Court, by the jury, or by both court and jury. The Circuit Courts rulings, which gave appropriate deference to the jury's findings, were in all respects correct and proper. No error was committed and judgment in all respects must be affirmed.

STATEMENT OF FACTS

Appellee Teresa Estep, of Panther, McDowell County, West Virginia, obtained a jury verdict in the Circuit Court of McDowell County against Appellants Ford Motor Company and Mike Ferrell Ford Lincoln-Mercury. At trial, Teresa proved by a preponderance of the evidence that the 1999 Ford Ranger was defective in that it was not reasonably safe for its intended use because the airbag failed to deploy when she struck a large maple tree. Her principal injury was a burst or compression fracture of the L-2 vertebrae requiring extensive surgical repair. Teresa also sustained a concussion. At the very start of the trial, the jury viewed both the crash scene and the entire vehicle, including the bent steering wheel. At trial a regulation size photo and enlargement photo of the vehicle were admitted into evidence.

The product liability claim at issue is that the Ford Ranger's single point sensor system mounted under the dashboard and near the radio did not signal the drivers' side airbag (or for that matter the passenger side airbag) to deploy when the vehicle struck a large maple tree on October 6, 2000. By all accounts, even Ford's accident reconstructionist, this crash was "serious". (Kent Vol. V, 215). Gary Derian, an accident reconstructionist retained by Respondent testified at trial that this was a severe crash. (Derian Vol. III, 114). He also explained the specific reasons the airbag was defective and why it failed to deploy in this serious crash.

Respondent's treating neurosurgeon, Dr. John H. Schmidt, III,[6] of Charleston testified, by videotape deposition, that, the crash resulted in a burst fracture of the L-2 vertebrae. (Schmidt Vol. II, 154). There was a wedge component to her fracture. This meant that "her spine was fractured through to the back of her spine." (Schmidt Vol. III, 27). Dr. Schmidt also explained there were elements of the back of the spine that were pushed into the spinal canal. (Schmidt Vol. III, 27). To repair the fracture Dr. Schmidt testified that the operating neurosurgeon Dr. Sherry Apple removed the fracture fragments, removing the L-2 vertebrae body and the disc above and below and replaced it with a titanium cage, with screws and plates on the side. (Schmidt Vol. III, 30).

Dr. Schmidt also told the jury that Teresa, who at the time was 26 years old, had received a concussion in the crash. In his words, "there's some exchange of energy between her noodle and the environment to the detriment of the victim, and to me, that means she had a concussion." (Schmidt Vol. III, 57). Dr. Schmidt testified that even if she did not lose consciousness, she was at least "amnestic", and could not remember events of the accident which is also evidence of a concussion. (Schmidt Vol. II, 52).

Teresa's claims were brought against both Ford Motor Company and Mike Ferrell Ford Lincoln-Mercury, Inc. They were represented by the same counsel. In fact, no corporate representative appeared on behalf of Mike Ferrell Ford Lincoln-Mercury, Inc. at trial.

Ford's version of the evidence takes some license, describing the accident sequence in ways the jury never found were true as evidenced by its unanimous verdict. At trial, Ford claimed this Ranger pick up truck traveling at 22 mph slid off a roadway slick with an oily substance, went airborne for a distance of 27 feet, struck the maple tree measuring two feet in width at an angle of

[6] Dr. Sherry Apple, a neurosurgeon practicing in the same group as Dr. Schmidt actually performed the surgery. Tragically, however, she died in a boating accident after the surgery and before trial. But, Dr. Schmidt continued the care for Teresa Estep until she was discharged from treatment.

40 degrees, which angle then increased to 70 degrees almost stopped then accelerated to 17 mph (with the engine dead) and regained altitude to fly through some Ironwood trees and then drop into the river at a height of 9 ½ feet, covering a total distance of 60 to 65 feet. In striking the maple tree, the Ranger rotated 180 degrees around the tree. That is not in dispute. (Wills Vol.VI, 227). Ford's flying truck theory was specifically designed to place the most energy of the crash at the point of entry into the river and not the tree and, thereby, exculpating the airbag failure as the cause of Teresa's fracture. This evidence was not accepted by the jury, which found the facts in favor of Teresa. It is not unusual the jury rejected Ford's airborne theory that this Ford Ranger flew a total of 60 to 65 feet.

Teresa's evidence, which was accepted by the jury proved that the vehicle slid off a slick road, rolled on its tires down the embankment and hit a two feet[7] diameter maple tree, pivoted and continued to roll on its tires backward to the river. Its entry into the river was described by Danny Hatfield, the tow truck driver as having "stabbed itself" or at an angle into the river. (Hatfield Vol. II, 104). This testimony directly conflicts with Ford's airborne theory of dropping into the river out of the air. Other evidence corroborated Mr. Hatfield and included that there was mud in the truckbed which would not have been deposited by falling into the river (the mud weighed over one ton), and there was an angled mud pattern across the rear portion of the fenders which reflected the identical angle as the river bank, corroborating a slide into the river. Finally, the mud was described as very soft which is the opposite of a hard landing causing the burst facture.

When the Ranger struck the tree at a speed, or more precisely at a change of velocity, ranging from 15 to 18 mph (Derian Vol. III, 114), Teresa Estep flexed violently forward over the steering wheel. The violent forward movement which occurred in milliseconds, caused the spinal fracture

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[7]The width is referred to variously as two feet and as 22 - 24 inches.

described by Dr. Schmidt. Dr. Schmidt, further explained Teresa received a concussion. Teresa's expert biomechanical engineer, Mari Truman, P.E., testified the concussion was the result of a very fast flexion over the steering wheel. Photographs documenting bruising on the inner part of her thigh as she moved forward and upward over the steering wheel supplied other corroborating evidence. Remember the Ford struck the tree at a 40 degree angle which increased to 70 degrees, or almost perpendicular and forced Teresa in the direction that caused this fracture. Significantly, Dr. Schmidt described a concussion which could only be explained by Teresa's movement upward and toward the windshield.

Teresa was not wearing a seat belt. That evidence was stipulated as prescribed by the statute. Accordingly, after a careful analysis of West Virginia Code §17C-15-49, and the stipulation the Circuit Court excluded evidence that she was not wearing a seat belt and as mandated by the statute reduced the medical bills awarded by 5% .(Design. Of Record, 9). A review and analysis of the fact and expert witness testimony, including that testimony of Dr. Schmidt, that there was a concussion, evidence Ford disputed without the benefit of an expert medical witness, places Ford's appeal in direct conflict with the weight of the evidence, which evidence the jury resolved in Teresa's favor.

At trial, the jury had the choice between Ford's theory and plaintiff's facts that the Ranger slid on the slick road surface, then rolled on its tires down the embankment, struck the tree which caused the burst fracture then flexed from the violent forward movement and then pivoted, on the ground, and then rolled on its tires backward into the river where the truckbed filled with mud. Had it dropped straight down, Ford could not explain the presence of one ton of mud in the bed of the truck.

Teresa, of course, testified. She was 26 years old when the crash occurred on October 6, 2000. On that morning, she was on her way to work at the Magic Mart. Her then husband was at

home because of a work related disability. By working for the first time in her life after being a stay at home mother, she looked forward to helping the family finances for her two sons as well as securing needed medical benefits (Estep Vol. IV, 239-241).

After taking her children to school at about 9:00 a.m. while near Panther and not far from home, Teresa encountered a slick, oily substance on the road and lost control. She was traveling at 30 to 35 mph. (Estep Vol. IV, 243). The accident investigation report and Danny Hatfield, the wrecker service owner, confirmed there was a slick substance on the road. Teresa did not remember going over the embankment, the smaller trees she ran over, the crash into the large maple tree or even entering the river until she "came to" in the river (Tug Fork), (Estep Vol. IV, 245). She smelled something burning and was in the river. Teresa made her way up the embankment where a Pepsi truck driver stopped to help. She testified that she thought, "...oh, my God, my back is broke, its killing me." Teresa was removed from the scene by ambulance to Welch and then to Charleston Area Medical Center - General Division where the late Sherry Apple, M.D., a neurosurgeon evaluated her condition and then performed the needed surgery. Teresa actually believed she was "blessed" because the L-2 fracture did not paralyze her (Estep Vol. IV, 249).

Eventually, Teresa was discharged from the care of Dr. Schmidt, who succeeded Dr. Apple and then was followed by Dr. Shishir Shah of the Know Pain Clinic in Beckley where she is treated monthly for continuing pain. (Estep Vol. IV, 251). Dr. Shah also testified by a videotape deposition. He is board certified in pain management. Dr. Shah testified he "doubted" Teresa would ever be able to discontinue medical care for pain management (Shah Vol III, 65).

Danny Hatfield was the first fact witness called to testify. He owns the wrecker service which was called to tow the Ford Ranger from the river and directed that work (Hatfield Vol II, 92). He also took photos of the truck and the scene which are identified in the record and admitted in

evidence as defendants Exs. 64 through 70 (Hatfield Vol. II, 97). Mr. Hatfield described, referring to the photographs that there was mud in the bed of the truck. (Hatfield Vol. II, 99, Exs. 66, 67). Further, Mr. Hatfield referenced the trees through which the Ranger "rolled" on its tires. (Hatfield Vol. II, 102, 103), and which testimony conflicted with Ford's expert "airborne" theory. He then described the truck was in the water at an "angle" and that it had "stabbed itself" (Hatfield Vol. II, 104) into the river. That is the opposite of Ford's theory of airborne drop. Mr. Hatfield also recounted that the mud in the bed was heavy weighing 1 to 1 ½ tons and that it "ripped the tailgate - it did- sucked it plumb off." (Hatfield Vol. II, 109, 110). Mr. Hatfield also had the opportunity to observe the road and told the jury that there was an oil or film on the road surface making it slick (Hatfield Vol. II, 111).

It was fairly concluded by the jury that Mr. Hatfield, the only witness to testify with actual knowledge of the truck and river, explained that the truck did not fall from the sky into the river from any height at all, let alone drop almost the height of a basketball rim. Rather, it "stabbed" into the river at an angle meaning that it slid backwards in a vertical direction which explains why its bed was full of mud.

Appellee called Gary Derian as an expert witness to testify to accident reconstruction issues and to the defect in the airbag system, as well as to the safe alternative design and the risk utility analysis.[8] As he testified to the jury, Mr. Derian inspected the scene some three years after the crash and accepted Ford's measurements (but not its airborne flight theory), such as the distances and

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[8] Mr. Derian is a registered professional engineer in the State of Ohio. He received his mechanical engineering degree from Case Western Reserve University in 1974 and received his Professional Engineer Certification in 1982. He worked in the automobile industry with BF Goodrich; National Academy for Professional Driving; Avanti Automobile Company; Nordson Corporation; Dunlop Tire; and, had experience in automobile racing. Mr. Derian is also a member of the Society of Automotive Engineers (SAE) including taking the accident reconstruction class sponsored by SAE. (Derian Vol. III, 76 - 80). To prepare to express his opinion, Mr. Derian "looked at the crash scene and inspected the vehicle". (Derian Vol. III, 80). The Court, after allowing voir dire by Ford's counsel, determined Mr. Derian who at the time he testified was employed by Robson Forensic was qualified as an expert in his field. (Derian Vol. III, 97).

locations from the road surface to the trees and to the river, including the 22-24 inch wide maple tree. To establish the basis for his opinions, Mr. Derian applied standard principles of engineering - conservation of energy and conservation of momentum-to the vehicle path during the crash. (Derian Vol. III, 78). The issue of fact to be decided by the jury was whether the truck stayed on the ground or as Ford theorized, flew through the air to the maple tree and then after impact and almost stopping, flew backwards and gained altitude and then dropped into the river, landing essentially on all four tires in the river mud.

Mr. Derian explained that the maple tree was the single frontal impact in the crash (Derian Vol. III, 105). He further explained, the truck does "get light" as it departs the road because of the suspension but the wheels stay in contact with the ground (Derian Vol III, 105). He based his testimony on the basic engineering principle of ballistic motion (meaning the motion of the vehicle was on the surface of the slope) that the truck is going downhill and the front end significantly outweighs the back end by a 60 to 40 ratio, so forces are acting on it to keep it on the down slope not in the air. At the 20 to 25 mph speed, it rolls on its tires, not flies down the hill and it is not airborne when it hits and pivots around the maple tree and then rolls backwards into the river (Derian Vol. III, 106). (Note: no airplane, and here the Ford Ranger had no wings, could take off the ground at these speeds.)

As part of his analysis, Mr. Derian determined from the crush depth of the vehicle that the Delta V, or velocity change or here velocity decrease, was 15 to 18 mph. (Derian Vol. III, 108). So, there was a little speed left over when the Ford Ranger struck the tree and almost, but not completely stopped. (Derian Vol. III, 109). Mr. Derian accepted Ford's calculation of the height and angle at which it struck the tree. The lower markings are only 29 inches off the ground (Derian Vol. III, 109). The smaller trees were not a factor in the crash. In any event, the height at which the Ford

Ranger struck the maple tree was not six feet as Ford argues.

The bumper, radiator support, hood and roof were all crushed .(Derian Vol. III, 110). The jury was able review the crash damage in photographs Plaintiff's Ex. [9] and in Ex. 12, which was an enlargement and from a view of the vehicle. At the first impact the rear tires raised up, which caused the roof to strike the tree. The initial angle was 40 degrees and it raised up to 70 degrees. Ninety degrees, of course, is perpendicular (Derian Vol. III, 112). The truck almost stopped and its back wheels were off the ground, and striking the maple tree a little bit off center. Then, the truck rotated 180 degrees and rolled backward the remaining distance into the river (Derian Vol. III, 113 - 116).

Mr. Derian expressed the opinion that at the speed at which the truck struck the tree, which was a "severe crash" the airbag should have deployed. The truck hit the tree hard with its frame rails and tow hooks, which were bent, and practically came to a stop (Derian Vol. III, 115). Mr. Derian testified that at 2 to 5 miles per hour after the Ford struck the tree it could not gain speed and fly into the river at 17 mph as Ford's expert theory concluded (Derian Vol. III, 116). The engine stopped running when it hit the maple tree. Ford offers no explanation to account for this supposed increase in velocity. Ford never answered the question of what energy was available to increase the Ranger's speed.

Exhibit 64 was physical evidence which confirmed Mr. Derian's expert opinion. It showed, as he explained, mud at the left rear quarter panel at an angle, the same as the water level and even a ridge of mud evidencing the angle at which it entered the river (Derian Vol. III, 118).

Further, Mr. Derian explained that the greatest energy from the crash was from the impact with the tree (Derian Vol. III, 120). The seat frame was not damaged which is further physical evidence that there was not an airborne entry into the river let alone with great force as Ford

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[9]This exhibit number cannot be currently located.

theorizes. When Mr. Derian inspected the truck, he measured the steering wheel and determined it was bent in that the lower part of the wheel was pushed down and away from the driver (Derian Vol. III, 127). Ford contested that measurement.[10] The jury inspected the Ranger and the bent steering wheel and heard the testimony of Mr. Derian and Ford's expert witnesses.

Of course, the airbag did not deploy. Mr. Derian also reviewed Ford's videotaped crash tests with a barrier and with an 8 inch pole. Those tests are the automobile industry standard to measure crash severity and hence the criteria for airbag deployment. Crash pulses by instrumentation record the severity of the crash. (Derian Vol. III, 131). The crash time is recorded to last about two tenths of a second or twenty milliseconds. (Derian Vol. III, 132). In the barrier crash a 30G (30 times gravity) pulse is recorded (Derian Vol. III, 137). In the 8 inch pole crash at about 19 mph, there is a delay in the crash pulse signal to 80 milliseconds (eight hundredths of a second). (Derian Vol. III, 133).

Mr. Derian explained Ford's crash tests results showed there was no delay time in sending a signal for the airbag to deploy in the barrier crash. The airbag is deployed as the result of a sensor reading the severity of a crash as measured by a crash pulse. (Derian Vol. III, 134). Of course, in a barrier crash airbag deployment is mandatory according to Ford's standards when there is a change in velocity of 14 mph or greater. Here, Mr. Derian determined that change of velocity at 15 to 18 mph. It was clear then that the airbag failed when deployment was mandatory again according to Ford's standards for this vehicle. In the pole crash there is a significant delay in the sensor determining whether or not to tell the airbag to deploy. The G pulse not the speed is controlling. (Derian Vol. III, 135). In the Ford 19 mph pole crash, the crash severity was greater than in the barrier crash (Derian Vol. III, 135, 136). In any event, the collision with the maple tree combined

[10]The photo copies of photographs attached to Ford's brief are at best an invitation to substitute this Court's fact determination for the jury's which inspected the steering wheel at trial.

elements of both a barrier crash, because of the width of the maple tree and a pole crash because of the depth of the front end crush.

Mr. Derian, based on this data, the severity of the crash, the crash reconstruction, adopting Ford's over the ground, not its airborne measurements, concluded the single point sensing system also failed to detect the G pulse of the pole crash, and that failure is well recognized in the auto industry literature (Derian Vol. III, 140). So the airbag failed under both barrier crash and pole crash test standards.

A single point sensor was installed in this Ford in an area near the radio behind the dashboard, and not on the front bumper. The sensor is responsible for sensing the crash severity (Derian Vol. III, 142). Mr. Derian explained that the sensor at this location in the dashboard failed to know there was a crash because the crash, which starts at the front bumper lasts only a hundred milliseconds but there is a delay up to 80 milliseconds in the sensor determining the crash severity and telling the airbag to deploy. (Derian Vol. III, 142, 143). By that time, the occupant is already thrown forward. (Derian Vol. III, 143). Mr. Derian identified SAE papers reporting this same defect in the single point sensor - it has a blind spot to a pole crash. (Derian Vol III, 144). Mr. Derian expressed that criticism that this airbag is defective "because it cannot sense this type of crash." (Derian Vol. III, 145).

Addressing the risk utility analysis Mr. Derian explained the alternative safe design was in fact Ford's earlier sensor system for this vehicle. (Derian Vol. III, 147). The alternative safe design is to place the sensor on the front (bumper) because when this crash occurs it will pick up the crash severity (Derian Vol. III, 147). Ford also used the forward crash sensor in another vehicle (Derian Vol. III, 148). In fact, earlier Ranger model sensors were in the crash zone up front. Ford, Mr. Derian testified, knew about and accepted this gap in protection caused by moving the crash sensor

from the crush zone to under the dash. (Derian Vol. III, 148).[11]

By Ford's own safety standard, a barrier crash requires airbag deployment at 14 mph. The bumper crush was 4-6 inches, as measured by Ford and 8 inches as measured by Mr. Derian, which he judged to be in the same range. In that respect, this crash resembled a barrier crash which would then require by Ford's standard, mandatory airbag deployment for greater than 14 mph. The radiator support crush measured by Ford was 4 to 6 inches and 6 inches as measured by Mr. Derian, and both measured the roof crush at 4 inches. Ford's change in velocity measurement was slightly lower because as Mr. Derian explained it ignored the roof crush.

Mr. Derian emphasized that as Ford's crash test data showed the 19 mph pole crash is more severe than the 14 mph barrier crash. Those are the criteria for the respective change in velocity at which the seat belt sensor tells the airbag to deploy. Protection for both crashes should be the same according to Mr. Derian because the pole crash energy is even greater, a fact which is known to Ford as reported in the videotape crash tests (Derian Vol. III, 152). Again, Mr. Derian made it clear that Ford and Toyota both use forward crash sensors in other models (Derian Vol. III, 153).

A critical part of Ford's cross examination of Mr. Derian was his explanation of the flaw in Ford's "ballistic motion" theory (Derian Vol. III, 174). The flaw in Ford's theory, however, is that when flying through the air, only friction slows down an object. Here, there was a combined vertical and horizontal velocity and, of course, the big tree impact. In short, Ford's "ballistic motion" theory does not account for the maple tree impact intersecting the vehicle path from the road to the river. So, unlike a bullet, the Ford Ranger did not fly unobstructed from the road to the river. (Derian Vol. III, 175). The truck definitely bounced along. (Derian Vol. III, 188). Referencing the recent

[11] Starting with the 1996 model, Rangers were equipped with this new single point sensor which over time was used to improve airbag and other crash safety systems. Unfortunately for Teresa Estep, not all the bugs were worked out of this new, but not yet safer, system by 1999, the year she bought her Ford Ranger.

literature, Mr. Derian explained that the automobile literature reports that the single point sensor would at times cause a late deployment and at other times, not deploy at all. (Derian Vol. III, 223).

On another point specific to the risk utility analysis, Mr. Derian testified that the crash sensors to which he referenced (in the crush zone) "are technically and economically feasible". (Derian Vol. III, 235 - 237). Mr. Derian further explained that when Ford changed its airbag sensing system to the single point sensors, installed under the dash, not in the crash zone, it did not work out all the bugs. In fact, Ford's old technology would have provided crash protection (Derian Vol. III, 250) which the customer pays for (Derian Vol. III, 251). Mr. Derian pointed to other vehicles employing sensors in the crush zone and to the body of authoritative automobile literature in support of his opinions. Further, Mr. Derian explained the cost of a crush zone sensor was minimal.

Expert evidence of the biomechanical explanation for Teresa's injury was offered by Mari Truman, P.E.[12] She testified that the principles of conservation of momentum and conservation of energy both. Newton's laws explained Teresa's L-2 fracture in this crash with a sudden change in velocity. (Truman Vol. IV, 72). The bone will deform when there is a force acting on it (Truman Vol. IV, 72, 75). Ford's trial counsel, after conducting voir dire, agreed Ms. Truman could "testify in some areas" (Truman Vol. IV. 99). In any event, the Court deemed Ms. Truman an expert witness in areas of biomechanics and biomedical fields (Truman Vol. IV, 99).

Ms. Truman inspected the Ford Ranger and the accident scene (Truman Vol. IV, 102). She inspected a photograph showing bruises on the thigh area of Teresa Estep. This includes both thighs

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[12] Mari Truman, P.E. is a biomechanical engineer (and registered professional engineer). She has worked in the field 26 years, receiving her degree in biomedical engineering from The Catholic University of America. (Truman Vol. IV, 52, 53). Her field of biomedical engineering or biomechanics primarily relates to the musculoskeletal system and movement of the body and interaction of the body with outside forces. Stated simply, biomechanics is the application of mechanical engineering science and physics to the body. (Truman Vol. IV, 55). Her experience includes extensive work designing orthopedic implants, including the type of hardware implanted in Teresa Estep. (Truman Vol. IV, 59). It is common in her field to understand loading, compression, bending and other forces on body structures. (Truman Vol. IV, 56). Certainly, she is knowledgeable about bone structure and bone fractures. (Truman Vol. IV, 61, 61, 69).

and the outside and inside areas. (Truman Vol. IV, 126). Ms. Truman reviewed the map of the scene; Dr. Schmidt's testimony, the hospital and operative records; x-rays, reports and deposition testimony of different experts, as well as Ford's crash data reports (Truman Vol. IV, 104, 105, 106). Obviously, she concluded the "big spinal injury", according to the doctor's diagnosis was at the L-2 level. (Truman Vol. IV, 107). Ms. Truman explained to the jury, using demonstrative aids that flexion is bending the spinal cord forward while extension is the opposite way (Truman Vol. IV, 109). Testifying in her area of expertise, Ms. Truman explained that injury patterns tell the story, particularly bone fractures (Truman Vol. IV, 122). The bone will fail from compression, tension, or from sliding/shearing. (Truman Vol. IV, 122). There can also be any combination of those forces. (Truman Vol. IV, 122). Ms. Truman showed the jury textbook illustrations of those types of spinal injuries (Truman Vol. IV, 124).

Significantly, Ms. Truman testified that the presence of many bone fragments, which Dr. Schmidt identified, means a high energy and very fast, big impact (Truman Vol. IV, 125). On the other side, even a drop onto the soft river mud could not be a source of Teresa's catastrophic injuries. A fracture is wedged, as here, when there is more compression on one side than the other. (Truman Vol. IV, 125).

Ms. Truman relied on Mr. Derian's explanation that the vehicle hit the tree and rotated up which caused Teresa to move forward. (Truman Vol. IV, 126, 127). Teresa was on the seat or a little bit in the air (although, either way makes no difference) and gripping the steering wheel. The steering wheel was bent according to Mr. Derian and the knee bolster was pushed forward. (Truman Vol. IV, 127). Ms. Truman explained that Teresa moved forward hitting the steering wheel which traps the bottom part of her body but nothing stops the upper part of her body which "whips right over." (Truman Vol. IV, 128). There was inner thigh bruising and no major abdominal injuries, so

the loading was between the steering wheel and Teresa's legs. (Truman Vol. IV, 130). The forces are adequate to cause this fracture (Truman Vol. IV, 130).

Ultimately, Ms. Truman testified the issue of fracture causation is explained either by striking the tree or by entering into the river. (Truman Vol. IV, 134) because these were the only points of impact at issue. She was emphatic that the crash into the maple tree caused the fracture. Clearly Ms. Truman rejected Ford's airborne drop into the water theory. She understood Mr. Hatfield testified that the vehicle "stabbed into the water," or entered at an angle (Truman Vol. IV, 134). In sum, Ms. Truman completely rejected Ford's "airborne" theory of dropping into the river, and so did the jury. Mr. Hatfield, the photo showing mud at an angle or slope (Truman Vol. IV, 136) and lack of underside damage were all reliable evidence (Truman Vol IV, 138, 140). Ms. Truman explained to a reasonable degree of biomechanical certainty that had the airbag deployed, the spinal fracture would not have occurred. (Truman Vol IV, 141).

Ms. Truman testified there was a high energy burst or compression fracture resulting from a rapid flex over the steering wheel when the Ford Ranger crashes into the maple tree and not from dropping into the mud which does not have a big deceleration pulse. (Truman Vol. IV, 146). The tailbone fracture, which is not really an issue here, is not a high energy fracture (Truman Vol. IV, 147) and is a common fracture. Finally, Ms. Truman relied on Dr. Schmidt's testimony concerning the concussion, (Truman Vol. IV, 151) which was consistent with her opinion as to the injury causation from the crash into the tree and flexion over the steering wheel. (Truman Vol. IV, 151).

Ford, on cross examination, without success tried to qualify Ms. Truman's opinion to a bent steering wheel (which the jury inspected) as essential to her opinion, and argued the steering wheel was not bent at all. The jury obviously rejected Ford's theory the steering wheel was not bent. Ms. Truman testified that the bent steering wheel was one of the facts on which she relied but that the

issue is "where's the big deceleration." (Truman Vol. IV, 205). On cross examination, Ms. Truman said whether or nor the steering wheel was rigid or bent, Teresa was "hung up" on it and whipping over the steering wheel caused the fracture because it is the greatest deceleration point. (Truman Vol. IV, 210, 211).

The defense called three expert witnesses at trial but no fact witnesses or medical expert witnesses. There were two retained experts, Joe Kent, Jr., P.E., an accident reconstructionist and Laura Wojcik, Ph.D., a biomechanical engineer and Joe Wills an engineer employed by Ford in one of its operating units and who was qualified as an airbag system expert witness.[13]

Mr. Kent's evidence was aimed at advancing Ford's single defense ballistic (bullet) trajectory theory that at 22 mph the Ford Ranger pick up truck departed the road surface, airborne, stayed in the air for a distance of some 27 feet (Wills Vol. VI, 226) crashed into the maple tree and almost stopped, raised up from 40 to 70 degrees, then accelerated to 17 mph with the engine not running, lost significant speed, rotated 180 degrees that gained altitude to 10 ½ feet above the river as it sailed through the twin trunks of the Ironwood tree and dropped into the river. (Wills Vol. VI, 227). (Note at other times Ford said the height was 9 ½ feet).

Mr. Wills did not and could not account for the tremendous energy exchange in the crash and loss of speed, the eyewitness account that the truck stabbed into the river at an angle and that the truck bed was filled with mud. Nonetheless, Mr. Kent admitted that the truck "stopped" when it hit the tree. (Kent Vol. VI, 89). So when Ford argues the importance of the Kent testimony, it repeats the arguments, facts and evidence the jury rejected.

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[13]Mr. Wills is noted as a Ford's expert in the well known book "Cape May Court House" which is based on the death of a Ford vehicle occupant as the result of a defective air bag deployment. There Ford theorized the vehicle occupant was murdered by her husband, and not fatally injured by a defective airbag and then tried to criminally prosecute him. The jury in the civil action could not agree on a verdict and the State of New Jersey could not agree with Ford's pathologist and declined to prosecute.

Laura Wojcik, Ph.D., Ford's biomechanical engineer, without independent verification, accepted Mr. Kent's reconstruction analysis. Ford needed to show the L-2 fracture occurred at a location other than at the tree crash where the airbag failed to deploy. (Wojcik Vol. VI, 5). Dr. Wojcik held a Ph.D. in her field and was employed full time with Packer Engineering Company, with much of her work devoted to testifying for car manufacturers. Even though she is not a medical doctor her opinion directly conflicted with the testimony of Dr. Schmidt that there was no concussion. (Wojcik Vol. VI, 19). Dr. Wojcik also disputed that the steering wheel was bent (Wojcik Vol. VI, 20). Once again, it is significant that the jury rejected her opinions, and accepted Teresa's evidence. Nonetheless, Dr. Wojcik did agree there was a thigh bruise (Wojcik Vol. VI, 26).

Dr. Wojcik admitted there was a compression or burst fracture but assigned the cause as dropping into the river and not from flexion when striking the tree. (Wojcik Vol. VI, 44, 45, 71, 79). Another of her disputed opinions rejected by the jury was that Teresa was not "on top of the wheel when it struck the tree. (Wojcik Vol. VI, 63).

On cross examination, Dr. Wojcik refused to acknowledge that because the lower scar on the maple tree was measured at 29 inches or less than three feet, Mr. Kent's airborne theory altitude gain to 9 ½ feet above the river was invalid (Wojcik Vol. VI, 77) which she nonetheless adopted. No one from Ford could explain how a vehicle with the engine dead gains altitude so it is airborne, nor did the jury find that occurred, recalling that Ford argued the truck speed increased from stopped or almost stopped to 17 mph (Wojcik Vol. VI, 80) before flying between the twin trunks of the ironwood tree and into the river and covering a distance of 60 to 65 feet.

Importantly, Dr. Wojcik did not dispute that a flexion injury as described by Mari Truman can cause this fracture (Wojcik Vol VI, 87). However, she disputed the river mud was soft (Wojcik Vol. VI, 100), so soft Teresa Estep, weighing a little more than 100 pounds, sunk in up to her waist.

(Wojcik Vol. VI, 101).

As brought out in cross examination Dr. Wojcik wrote, in her expert witness report, there was no deformation to the seat rail, seat pan or seat frame but there was tailgate damage. (Wojcik Vol. VI, 102). Remember, Mr. Hatfield pulled on the tailgate which can account for that damage (Wojcik Vol. VI, 109). Her testimony differed from her report in that she adopted Mr. Kent's findings of a damage area under the passenger side seat, but did not know whether the rough ride down the hill would cause that to occur (Wojcik Vol. VI, 103).

Ford's final witness was Joe Wills, manager of its vehicle dynamics group where he had responsibilities for airbags (Wills Vol. VI, 125). He was employed by Ford for 42 years and had testified on its behalf between 150 to 200 times including the in Cape May Courthouse case, supra (Wills Vol. VI, 136). Mr. Wills explained, as Mr. Derian had already demonstrated, that there is a sensor located at the center line tunnel, which signals the airbag whether or not to deploy. (Wills Vol. VI, 147, 152). Mr. Wills disputed Mr. Derian's testimony concerning the bending of the steering wheel (Wills Vol. VI , 200). The jury, it is recalled, inspected the vehicle including the steering wheel and the accident scene. (Wills Vol. II, 77, 80). Mr. Wills was not himself qualified as an accident reconstructionist. (Wills Vol. VI, 210).

On cross examination, Mr. Wills, as the Ford trial representative could not explain that Dr. Wojcik in her earlier report stated that the Ford Ranger was in a free fall from the maple tree to the river rather than the Ironwood tree into the river . (Wills Vol. VI, 227) (emphasis added). Either way, Mr. Wills maintained the truck was airborne a distance of some 60 to 65 feet or before and after striking the maple tree. He insisted it was never on the ground and stayed in the air the entire time, even though, its path was redirected by the maple tree. (Wills Vol. VI, 225 - 260).

Finally, Mr. Wills testified the tow hooks were imprinted on the maple tree. The tow hooks

were measured at 20 inches apart, but the tree, as Ford measured was 24 inches (two feet). The width of the tree comprised a significant part of the bumper width. He testified the front bumper was crushed 4 to 8 inches in depth about the same as a barrier crash and not 15 inches as in a pole crash. The change in velocity was greater than the 14 mph limit of a barrier crash and the impact severity was similar to a barrier crash because the object struck was much wider than an 8 inch pole and not as wide as the tree (Wills Vol. VI, 242). Mr. Wills, however, was not clear in recognizing the barrier crash similarities even when confronted with the undisputed measurements.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY APPLIED THE PLAIN LANGUAGE OF WEST VIRGINIA CODE § 17C-15-49(d) TO EXCLUDE EVIDENCE OF NON USE OF THE SEATBELT AT TRIAL, AND THE COURT'S APPLICATION OF THAT STATUTE DID NOT DENY FORD'S DUE PROCESS RIGHTS.

A. The Circuit Court Properly Applied the State's Seat Belt Statute in Excluding Evidence of Seat Belt Non-Use.

In a very real sense Ford lost its argument that evidence of non use of the seatbelt is not admissible not on the day, Judge Murensky ruled, but on the day West Virginia Code § 17C-15-49 became law because the statute itself controls the Court's decision. West Virginia Code § 17C-15-49(d) provides in relevant part:

> (d) **A violation of this section is not admissible as evidence of negligence or contributory negligence or comparative negligence in any civil action or proceeding for damages, and shall not be admissible in mitigation of damages**: Provided, That the court may, upon motion of the defendant, conduct an in camera hearing to determine whether an injured party's **failure to wear a safety belt was a proximate cause** of the injuries complained of. Upon such a finding by the court, **the court may then**, in a jury trial, by special interrogatory to the jury, **determine** (1) that the injured party failed to wear a safety belt and (2) **that the failure to wear the safety belt constituted a failure to mitigate damages.** The trier of fact may reduce the injured party's recovery for medical damages by an amount not to exceed five percent thereof. **In the event the plaintiff stipulates to the reduction of five percent of medical damages,** the court shall make the calculations and **the issue of mitigation of damages for failure to wear a safety belt shall not be presented to the jury.** In all cases, the actual computation of the dollar amount reduction shall be determined by the court. (emphasis added).

The words of this statute are clear: failure to wear a seat belt, is not admissible as evidence of negligence or contributory negligence or comparative negligence in any civil action or proceeding for damages, and shall not be admissible in mitigation of damages. Thus, failure to wear a seatbelt is clearly inadmissible with regards to negligence and damages. More important, where the defendant alleges, as Ford does here, that the plaintiff's failure to wear a seatbelt was a proximate cause of the plaintiff's injuries, then the plaintiff may stipulate to a 5% reduction in the award of medical damages or elect for the jury to hear evidence about the plaintiff's seatbelt nonuse. Therefore, under this statute, the only time evidence pertaining to the failure of a plaintiff to wear a seatbelt can be admissible in West Virginia is when the plaintiff elects to not stipulate to the 5% reduction in medical bills.

The Circuit Court correctly applied this statute to the facts presented to it. In its January 27, 2006 Order, the Circuit Court performed the requisite analysis and determined that proximate cause was at issue. Accordingly, it applied the plain words of the statute to exclude evidence of non use of the seatbelt and explained its analysis as follows:

> Although West Virginia Code 17C-15-49(a) requires the operator of a passenger vehicle to wear a seat belt, it is West Virginia Code 17C-15-49(d) that relates to its admissibility in a civil action. West Virginia Code 17C-15-49(d) is as follows: [quotation omitted].
>
> **There is a two part analysis to [sub]section (d). The first part states that a violation of 17C-15-49**, which is the **failure to wear a seat belt, is not admissible as evidence** of negligence or contributory negligence or comparative negligence **in any civil action or proceeding for damages**, and shall not be admissible in mitigation of damages. **This language plainly relates to negligence and damages.**
>
> **The second part of [sub]section (d) relates to causation.** It says that the Court is to conduct an in camera hearing to determine whether the injured party's failure to wear the safety belt was a proximate cause of the injuries complained of. Upon the Court finding that the failure of the injured party to wear the seat belt was a proximate cause of the injured party's injuries, then the Court is to submit two interrogatories to the jury, unless the injured party stipulates to a reduction of five percent [5%] of medical damages. In other words evidence of not wearing the seat belt is admissible for the purpose of causation, unless the

injured party stipulates to the five percent (5%) reduction of medical expenses. **If the injured party stipulates to the five percent (5%) reduction, then the evidence of not wearing the seat belt is not admissible for the purpose of causation.** This is the plain language of the statute. (emphasis added).

The Circuit Court reiterated its above rationale in the March 14, 2007 final Order, when it again applied the plain language of the statute to the facts before it.

B. The Circuit Court's Refusal to Ignore the Clear Expression of the Legislature Should Not Be Disturbed.

Ford argues that the Circuit Court's application of the plain wording of the statute was wrong. Thus, Ford asks this Court to ignore the statute's plain wording and instead embroider the terminology contained in the statute until it means something entirely different. That is not allowed under West Virginia law. Rather, under West Virginia law, "'[i]f the language of an enactment is clear and within the constitutional authority of the law-making body which enacted, courts must read the relevant law according to its unvarnished meaning, without any judicial embroidery. . .'"[14] See Syl. pt. 4 of Lexington Land Co., LLC v. Howell, 211 W. Va. 644, 567 S.E.2d 654 (2002); see also Syl. pt. 3, in part, West Virginia Health Care Cost Review Auth. v. Boone Mem'l Hosp., 196 W. Va. 326, 472 S.E.2d 411 (1996); Frymier v. Higher Educ. Policy Comm'n, 221 W. Va. 306, 317, 655 S.E.2d 52, 63 (2007) (J. Maynard, concurring).

This is because, as the Court has repeatedly acknowledged,"'[i]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten' by this Court simply to address

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[14] "When a statute is clear and unambiguous and the legislative intent is plain the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syl. pt. 1, Cummins v. State Workmen's Comp. Comm'r, 152 W. Va. 781, 166 S.E.2d 562 (1969); Syl. pt. 2, Zelenka v. City of Weirton, 208 W. Va. 243, 539 S.E.2d 750 (2000); see also Syl. pt. 3, Taylor v. Nationwide Mut. Ins. Co., 214 W. Va. 324, 589 S.E. 2d 55 (2003). ("A statutory provision which is clear and unambiguous and plainly expresses as the legislative intent will not be interpreted by the courts but will be given full force and affect.").

public policy concerns... (internal citation omitted). Rather, it is the role of the Legislature to address issues of public policy. (footnote omitted)." See Taylor v. Nationwide Mut. Ins. Co., 214 W. Va. 324, 331, 589 S.E.2d 55, 62 (2003); see also Mt. State Bit Services, Inc. v. State, Dept. of Tax and Revenue, 217 W. Va. 141, 147, 617 S.E.2d 491, 497 (2005) (Davis, J., Maynard, J. dissenting).

This Court further expressed its distaste for substituting its thoughts for those of the Legislature in Taylor-Hurley v. Mingo County Bd. of Ed., 209 W. Va. 780, 787-88, 551 S.E.2d 702, 709-10 (2001), where it declared:[15]

> We have previously signaled that it is this Court's duty 'to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust, or unreasonable results.' (internal citation and footnote omitted). **This does not mean, however, that we are at liberty to substitute our policy judgments for those of the Legislature whenever we deem a particular statute unwise**. As one commentator has astutely observed, the absurd results doctrine should be used sparingly because it entails the risk that the judiciary will displace legislative policy on the basis of speculation that the legislature could not have meant what it unmistakably said. (citation omitted) (emphasis added).

In this instance, the statute at issue, West Virginia Code § 17C-15-49(d) is clear. A defendant shall not present evidence regarding the plaintiff's failure to wear a seat belt as evidence of negligence, contributory negligence, comparative negligence, or for use in the mitigation of damages. See W. Va. Code § 17C-15-49(d) (2008). Further, if the plaintiff stipulates to a 5% reduction of medical damages, the defendant is barred from presenting evidence that the plaintiff's failure to wear a seatbelt was a proximate cause of the plaintiff's injuries. See id. Therefore, if the plaintiff makes the optional stipulation, all evidence of seatbelt non use must be excluded from the jury's consideration. On the other hand, if plaintiff does not stipulate and contests evidence of non use, then a jury decides the issue.

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[15] As the Oklahoma Supreme Court aptly noted in Comer v. Preferred Risk Mut. Ins. Co., 991 P.2d 1006, 1015 (Okla. 1999): "[N]o court has the power to act as a super-legislature by re-writing legislative enactments to conform with its views of public policy. (footnote omitted)."

Here, Ford is attempting to argue that Teresa's failure to wear a seabelt proximately caused, at least in part, her injuries and resulting damages. That argument is clearly barred by the plain wording of West Virginia Code § 17C-15-49(d). Thus, the only way for Ford to prevail on this issue would be for this Court to embroider or somehow change the meaning of West Virginia Code § 17C-15-49(d). Such an embroidery is disfavored by this Court and should not be permitted.

C. The Legislature Is Charged with Policy Choices

The Legislature speaks as the voice of the people. The Legislature is charged with the function of weighing policy concerns and determining what is in the public's best interest. Acting in the best interest of the public, the West Virginia Legislature in 1993 enacted West Virginia Code § 17C-15-49 to promote seat belt use by requiring motor vehicle drivers and front seat passengers to wear seat belts. The West Virginia Legislature adopted a public policy that balances the competing interests involved. These include encouraging motor vehicle users to buckle up (rather than immunizing vehicle manufacturers), while at the same time not severely penalizing motor vehicle occupants injured when not using restraining devices. The Legislature accommodated the latter concern by including in West Virginia Code § 17C-15-49(d) a provision permitting an injured person, such as Teresa, to stipulate to a five percent (5%) reduction in medical damages in return for the exclusion of all evidence of seat belt non-use.[16] Without that stipulation, if seatbelt use is contested by the occupant, then the jury will decide the issue.

The Legislature, it is reasonable to conclude, made this accommodation in light of the fact that numerous courts have recognized that motor vehicle drivers and passengers frequently do not use safety belts. See, e.g., Morgen v. Ford Motor Co., 797 N.E.2d 1146, 1149 (Ind. 2003) ("The [C]ourt [of Appeals] ... had 'repeatedly held that it is "clearly foreseeable" that a passenger might

[16] Missouri, in Newman v. Ford Motor Company, 975 S.W.2d 147 (1998), provides for a statutory penalty to reduce at least some part of the verdict when there is evidence of non-use.

fail to wear a safety belt.'");

The Legislature obviously felt that the 5% reduction in medical damages, which was, as recently as the 2008 legislative session, reevaluated and reapproved by the Legislature, was correct and appropriate. See 2008 W. Va. H. B. 2512. This was a legislative decision. In other areas such as the rape shield laws, the statutes of limitations and repose, and the rules governing joint and several liability the legislature determines the public policy. Each required the Legislature to perform a policy analysis similar to the policy analysis it performed when deciding the best was to encourage both occupant safety and seatbelt use. In each instance, whether it was a rape victim's right to privacy versus an accused's right to fully and fairly defend him or herself, an injured party's right to seek reparation versus the need for certainty and closure, or an injured party's right to full reparation versus a defendant's right to accept responsibility only for its own actions, the Legislature weighed one side of the issue against the other and determined what was best for West Virginia as a whole. This is a uniquely legislative function and one which should not be disturbed by this Court where, as here, there is no ambiguity in the statute at issue.

D. Ford's Analysis, Which Assumes Ambiguity, Improperly Compares West Virginia Code§ 17C-15-49 To Dissimilar Seatbelt Statutes in Other States.

West Virginia's Seatbelt Statute, West Virginia Code § 17C-15-49, is unique among the fifty states.[17] No other state has a seatbelt statute that carves out an exception for proximate cause while

[17] Ala. Code §32-5B-7(2008); Alaska Stat. §28.05.095(2008); Ariz. Rev. Stat. §28-907-907 (2008); Ark. Code. Ann. §27-37-703(2008); Cal. Vehicle Code § 278315.3(2008); Colo. Rev. Stat. §42-4-237 (2008); Conn. Gen. Stat. §14-100a (2008); Del. Code Ann. § 4802 (2008); D.C. Code Ann. § 50-1807 (2008); Fla. State. Ann. § 316.614 (2008); Ga. Code Ann. § 40-8-76 (2008); Haw. Rev. Stat. § 291-11.6 (2008); Idaho Code § 49-673 (2008); 625 Ill. Comp. State 5/12-603.1 (2008); Ind. Code § 9-19-10-7 (2008); Iowa Code § 321.445 (2008); Kan. Stat. Ann. § 8-1344, 2503, 2504 (2008); Ky. Rev. Stat. Ann. § 189.125 (2008); La. Rev. Stat. Ann. § 32:295:1 (2008); Me. Rev. Stat. Ann. 29, §2081 (2008); Md. Code Ann.., Transportation § 22-412.3 (2008); Mass. Gen. Laws ch. 90 § 7AA, 13A (2008); Mich. Comp. Laws § 257.710e (2008); Minn. Stat. § 169.685-686 (2008); Miss. Code Ann. § 63-7-301, 63-2-3 (2008); Mo. Rev. Stat. § 307.178 (2008); Mont. Code Ann. § 61-13-103 (2008); Neb. Rev. Stat. § 60-6,273 (2008); Nev. Rev. Stat. 484.474, 484.461 (2008); N.H. Rev. Stat. Ann. § 265:107-a (2008); N.J. Stat. Ann. § 39:3-76.2a (2008); N.M. Stat. Ann. § 66-7-369 (2008); N.Y. Vehicle and Traffic Law § 1229-c (2008); N.C. Gen. Stat. § 20-135.2A (2008); N.D. Cent. Code § 39-21-41.2-.4 (2008); Ohio Rev. Code Ann. § 4511.81, 4513.263 (2008); Okla. Stat. Ann. § 11-1112, 12-417 (2008); Or. Rev. Stat. § 31.760 (2008); Pa. Cons. Stat. § 4581 (2008);

permitting a plaintiff's recovery to be reduced by a set percentage and as administered by the Court. Michigan, Missouri, Nebraska, Oregon, and Wisconsin all allow for a plaintiff's recovery to be reduced by a set percentage, but they all rely on the jury to make that reduction after hearing evidence of a plaintiff's failure to buckle up.[18] See Mich. Comp. Laws § 257.710e (2008); Mo. Rev. Stat. § 307.178 (2008); Neb. Rev. Stat. § 60-6,273 (2008); Or. Rev. Stat. § 31.760 (2008); Wis. Stat. § 347.48 (2008). Other states, such as Wyoming and Vermont, make inadmissible all evidence of a person's failure to wear a seatbelt without penalty. See Wyo. Stat. Ann. § 31-5-1402 (2008); Vt. Stat. Ann. 23 § 1259 (2008). While still other states, such as Indiana, Mississippi, and Delaware limit the use of evidence regarding failure to wear a seatbelt, but do not bar it entirely. See Del. Code Ann. § 4802 (2008); Ind. Code § 9-19-10-7 (2008); Miss. Code Ann. § 63-7-301, 63-2-3 (2008). Only West Virginia, upon the election of the plaintiff, completely excludes from the jury's knowledge any information about seatbelt use while relying on the court to make a post-verdict reduction if causation is at issue. See W. Va. Code § 17C-15-49 (2008).

Relying on very different seatbelt statutes from a small select number of states and a niche of opinions mostly from federal courts which usurp the legislature's intent in those statutes,[19] Ford

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R.I. Gen. Laws § 31-32-32 (2008); S.C. Code Ann. § 56-5-6520, 6540 (2008); S.D. Codified Laws § 32-38-4 (2008); Tenn. Code Ann. § 55-9-604 (2008); Tex. Transportation Code Ann. § 545.413 (2008); Utah Code Ann. § 41-6a-1806 (2008); Vt. Stat. Ann. 23 § 1259 (2008); Va. Code Ann. § 46.2-1092 (2008); Wash. Rev. Code § 46.61.688 (2008); Wis. Stat. § 347.48 (2008); Wyo. Stat. Ann. § 31-5-1402 (2008); 2008 Conn. Legis. Serv. P.A. 08-32 (H.B. 5748); 2008 Ky. Laws Ch. 108 (SB 120); 2008 Miss. Laws Ch. 520 (H.B. 558).

[18] The state with the legislation closest to our seat belt statute is probably Nebraska. It also carves excludes evidence related to proximate cause. However it differs from our statute in that it allows evidence of seatbelt nonuse in if it pertains to mitigation of damages. See Neb. Rev. St. §60-6,273 (2008) ("Evidence that a person was not wearing an occupant protection system at the time he or she was injured shall not be admissible in regard to the issue of liability or proximate cause but may be admissible as evidence concerning mitigation of damages, except that it may not reduce recovery for damages by more than five percent.").

[19] An example of the federal courts' overwhelming tendency to usurp the power of state legislation is seen in the cases of LaHue v. General Motors Corp., 716 F. Supp. 407 (W.D. Mo. 1989) and Newman v. Ford Motor Co., 975 S.W.2d 147 (Mo. 1998). In LaHue, an opinion which is closely followed in Brown, discussed infra, the District Court for the Western District of Missouri held, purportedly applying Missouri law, that evidence of not wearing a seatbelt was admissible in the case before it because the Missouri statute did not apply to crashworthiness

attempts to argue that it is somehow the right and duty of this Court to overrule the Legislature and permit it to retry this case with the jury being informed of Teresa's failure to wear a seatbelt on the day of the collision. This is despite the fact that such a result would be in direct contravention to West Virginia Code § 17C-15-49.

Specifically, Ford argues that our clearly worded statute is ambiguous, perhaps because even Ford knows that were this Court to find our seatbelt statute to be clear and unambiguous, then it would have no alternative but to rule that Ford's position has no merit. In making its argument, Ford relies on the rulings of the Seventh Circuit Court of Appeals (applying Illinois statute), the Tenth Circuit Court of Appeals (applying Kansas statute, the Louisiana Supreme Court,[20] the Fourth Circuit Court of Appeals (applying South Carolina statute),[21] the District Court for the Eastern District of Virginia (applying Virginia statute), the Indiana Supreme Court, the Mississippi Supreme Court, and the Delaware Supreme Court.

None of the cases relied upon by Ford contain a statute similar to our statute. So, none of these cases are controlling or even helpful to this case. For the purposes of brevity only one of Ford's cases will be discussed, the Eastern District of Virginia case, Brown v. Ford Motor Co., 67 F. Supp. 2d 581 (E.D. Va. 1999).[22] Neither Brown, however, nor the Virginia statute is dispositive

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cases. 716 F. Supp. at 412. Later, confronted with a similar situation, the Supreme Court of Missouri, in Newman, held that the District Court had been absolutely wrong in its analysis of the Missouri statute and that the District Court's error was grounded in the disrespect it showed for the intention of the Missouri Legislature which had, in the opinion of the Supreme Court of Missouri, clearly intended to include crashworthiness cases within the ambit of the Missouri statute. 975 S.W.2d at 155.

[20] The portion of the Louisiana case relied upon by Ford is the dicta set forth after the Louisiana court announced that the plaintiff had abandoned her crashworthiness claim.

[21] Ford fails to inform the Court that it is relying on the concurring opinion, not the majority opinion.

[22] This case is selected because of the physical proximity between Virginia and West Virginia, the common legal history shared by the two states and the fact that although the Virginia statute is very dissimilar from the West Virginia statute, it is the closest of those statutes selected by Ford for comparison.

of the seat belt issue here for at least two very good reasons.

First, the Virginia statute, Va. Code Ann. § 46.2-1092, provides, in pertinent part, that "[f]ailure to use [seat belts] shall not be deemed to be negligence. Nor shall evidence of such nonuse of such devices be considered in mitigation of damages of whatever nature." Thus, the Virginia statute, does not provide the plaintiff with the ability to completely bar any causation evidence from the jury's consideration by stipulating to a 5% reduction in medical damages.[23]

Second, the Eastern District did not, as Ford is requesting of this Court, change the wording of the Virginia statute. Rather, it applied the Virginia statute, which plainly contains no evidentiary exclusion of evidence of crashworthiness, i.e. causation, exactly as written and allowed the evidence of seatbelt nonuse into evidence for the purpose of establishing causation. This point was emphasized by the Fourth Circuit Court of Appeals when it considered the statutory construction issue in Brown v. Ford Motor Co., 2001 WL 285072 (4th Cir.) on appeal, a decision to which Ford makes no reference. Specifically, the Fourth Circuit noted that, "[b]ecause section 46.2-1094 does not categorically prohibit seat belt nonuse by all persons under all circumstances, but, rather, prohibits nonuse only by specified persons in specified circumstances, evidence of mere seatbelt nonuse, in and of itself, in no sense at all constitutes as 'violation' of the statute." See id. at **3 (internal citations omitted)(emphasis added).

It is thus readily apparent there is no ambiguity in West Virginia's seatbelt statute that would permit this court to embroider its language. There is no ambiguity in West Virginia Code § 17C-15-49 also prohibiting this Court from looking to look to the case law for guidance as to how to interpret this statute, and the cases provided by Ford are neither persuasive or controlling. Put simply, to follow the opinions cited by Ford would be to create bad law due to the vast statutory differences

[23] No other case/statute cited by Ford comes any closer to the West Virginia statute.

between West Virginia Code § 17C-15-49 and the statutes in the cases cited by Ford.

E. Syllabus point 3 of *Blankenship v. General Motors Corp.*, this State's Seminal Crashworthiness Case, Requires this Court to Uphold the Rule Prohibiting Admissibility of Seat Belt Non Use Evidence.

Ford's analysis also fails to inform this Court of the fact that there is a West Virginia case directly on issue on the subject of what law to adopt in the case of a statutory ambiguity in a crashworthiness case, Blankenship v. General Motors Corp., 406 S.E.2d 781 (W. Va. 1991).[24] This case requires affirmance of the circuit court's ruling on the inadmissibility of seat belt use evidence. This is because Syllabus point 3 of Blankenship holds that: "In the litigation of vehicle crashworthiness cases under theories of product liability, whenever there is a split of authority in other jurisdictions on an issue about which this court has not yet spoken, the trial court should presume that we would adopt the rule most favorable to the plaintiff." Footnote 9 in Blankenship explains this rule stating that a "split of authority" can only occur if "the rule urged by the plaintiff [was] pronounced either by the highest court of a state or a federal circuit court. Neither state intermediate courts of appeals cases nor federal district court cases are sufficiently authoritative to constitute [a] 'split of authority' ..." 406 S.E.2d 781, 786.

Just such a split exists here. In the following cases, the highest state court or a federal circuit court interpreted a seat belt statute and found that evidence of seat belt non-use was **inadmissible** in a product liability action alleging defective motor vehicle design or crashworthiness: Olson v.

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[24] Ford also fails to cite two West Virginia cases, Miller v. Jeffrey, 213 W. Va. 41. 576 S.E.2d 520 (2002) and Wright v. Hanley, 182 W. Va. 334, 387 S.E.2d 801 (1989), which are directly on point as to the common law duty to wear a seatbelt and admissibility of seatbelt nonuse in West Virginia. Wright held that "[i]n the absence of a mandatory statutory duty to wear seatbelts, evidence of a plaintiff's failure to wear a seat belt is not admissible in a negligence action to assess plaintiff's percentage of fault or to show plaintiff's failure to mitigate damages." Syl. pt. 2, 182 W. Va. 334, 387 S.E.2d 801. Miller held that "[w]hen our mandatory seatbelt statute, West Virginia Code § 17C-15-49 (1993), is inapplicable, evidence of a plaintiff's failure to wear a seatbelt is not admissible in a negligence action to assess plaintiff's percentage of fault or to show plaintiff's failure to mitigate damages." Syl. pt. 4, 213 W. Va. 41, 576 S.E.2d 520. Thus, under West Virginia common law, the information Ford seeks to admit would clearly be deemed inadmissible.

Ford Motor Co., 558 N.W.2d 491 (Minn. 1997); Burck v. Pederson, 704 N.W.2d 532 (2005), Reed v. Chrysler Corp., 494 N.W.2d 224 (Iowa 1993); Ulm v. Ford Motor Co., 750 A.2d 981 (Vt. 2000); Shipler v. General Motors Corp., 710 N.W.2d 807 (Neb. 2006). Of course, Newman discussed supra is another crashworthiness decision reaching this same result excluding evidence of non use of a seatbelt and applying a statutory penalty.

The first four cases to be discussed in which evidence of seatbelt use was excluded, Olson, Burck. Reed, and Ulm, all involve states where the seatbelt statute at issue bars all evidence of seatbelt use or nonuse from the jury's consideration, much as the West Virginia statute does if the plaintiff agrees to take the 5% reduction in medical damages. The fifth, Shipler, contains an analysis of a state statute containing a percentage reduction similar to West Virginia's. The first case dealing with total exclusions is Olson.

In Olson, the court was presented with a fairness argument similar to the fairness argument presented to this Court by Ford. That argument arose from Minn. Stat. § 169.685 (2008), which provides that "[p]roof of the use or failure to use seatbelts or a child passenger restraint as described in subdivision 5 ...shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle."

The plaintiff in Olson received injuries as a result of wearing what he deemed to be a defective seatbelt. 558 N.W.2d at 493. Accordingly, the plaintiff began his argument similarly to how Ford begins its arguments in this case, by arguing that the statute at issue did not apply to crashworthiness cases. The Supreme Court of Minnesota promptly rejected that argument, stating that the words of the statute were clear, thus, "absent some other justification allowing [it] to

consider legislative intent, [it] need look no further than the express language of the statute."[25][26] Id. at 494.

The court went on, however, to consider the plaintiffs' policy argument under a Minnesota statute, which prohibits an "absurd" construction of a statute. Olson, 558 N.W.2d at 495. In making that argument, the plaintiff argued that it would be absurd to apply the clearly worded Minnesota statute in his case because the Minnesota statute was enacted in order to protect plaintiffs. Id. at 494. The Minnesota Supreme Court disagreed, stating the statute was designed to protect both injured plaintiffs and defendant automotive manufacturers. Id. Importantly, the court noted that, policy aside, "[it's] role, in any case, [was] not to challenge the wisdom of the legislature's act from a distance, but rather to give effect to its will as expressed in the unambiguous language of the statute." Id. at 496.

The same can be said for the Court in this case. Ford argues that an absurd result could be reached by strict application of West Virginia's seatbelt statute, but that does not necessarily mean that the legislature did not consider such an allegedly absurd result in crafting the statute. In any event, as recognized by the Olson court, just because a result does not necessarily make sense in one case does not mean that a statute is poorly designed or should be disregarded. This point is again emphasized in Burck.

In Burck, another crashworthiness case, originating in Minnesota, the plaintiff was wearing what he alleged to be a defectively designed seatbelt. 704 N.W.2d at 534. The plaintiff alleged the seatbelt was defective because he received an abdominal hematoma during a motor vehicle collision

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[25] The court went on to note that "[w]hen the words of a law in their application to an existing situation are clear and free from ambiguity, the letter of the law shall not be distrubed under the pretext of pursuing the spirit." See Olson, 558 N.W.2d at 494.

[26] Under West Virginia law, which only excludes evidence of seatbelt nonuse, a different conclusion would be reached. See W. Va. Code § 17C-15-49 (2008).

that was caused by contact with the seatbelt. Id. at 533. The plaintiff further alleged that the Minnesota statute, which provided that "proof of the use or failure to use seat belts ... shall not be admissible in evidence in any litigation involving personal injuries or property damage resulting from the use or operation of any motor vehicle," produced an "unreasonable, absurd" result in his case as the seatbelt actually caused the injury, thus by barring mention of it he was, in essence, denied a remedy. See id. (quoting Minn. Stat. § 169.685 (4)(a) (2004)).

The court noted, in response to the plaintiff's argument, that "[w]hen interpreting a statute [its] function [was] to ascertain and effectuate the legislature's intention . . . 'If a statute is free from ambiguity, [it was] only to examine the plain language.'" See id. at 534. The court found that in this case the legislative language was clear. Further, and perhaps more importantly, the court found that

> Although it might be argued that the law unfairly prevents a person allegedly injured by a seatbelt from proving the cause of the injury, the result is not absud if the legislature purposely created the restriction on that proof. It is undisputed that the legislature has the power to create and to limit rights. Limitations can sometimes be criticized as unfair. The appellants have plausibly shown that the seatbelt gag rule can be unfair when applied in certain circumstances. But they have failed to show the restriction was not within the purpose of the law. See Id. at 535.

The Court of Appeals of Minnesota went on to note that its conclusion was bolstered by the fact, (the West Virginia Legislature reconsidered and reaffirmed West Virginia Code § 17C-15-49 during the most recent legislative session), the legislature of Minnesota had considered the Minnesota seat belt statute during the pendency of Burck and made no change in the statutory language. See Burck, 704 N.W.2d at 535. Reed, although it deals with an instance of seatbelt nonuse, reaches the same result.

In Reed, the plaintiff was injured in a jeep rollover accident on August 18, 1985. 494 N.W.2d at 225-26. His injuries were allegedly aggravated by his failure to wear a seatbelt. Id. The statute at issue was Iowa Code section 321.445(4)(a) (1991) which provided that "[t]he nonuse of

a safety belt or safety harness by a person is not admissible or material as evidence in a civil action brought for damages in a cause of action arising prior to July 1, 1986." See id. at 229. The defendant argued that because the legislature would have allowed the disputed evidence in post-1986 cases, it meant to allow such evidence in all cases. Id. The Court found however, that "[t]he legislature, for reasons it chose, enacted a flat prohibition of seatbelt evidence in cases arising prior to the time seat belt use was required in Iowa. **We are required to follow this clear mandate.**" See id. (emphasis added).

In Ulm, the plaintiff was again injured due to his failure to wear a seatbelt. 750 A.2d at 987. The Supreme Court of Vermont found that the statute at issue, Title 23 V.S.A. § 1259 (d), provided that "[n]oncompliance with the provisions of this section shall not be admissible as evidence in any civil proceeding." See id. The Ulm court held that the statute barred "the introduction of evidence of a failure to wear a safety belt in a civil proceeding irrespective of the legal theory advanced by a party. Thus, the [trial] court did not err in excluding this evidence." Id. at 987-88.

In Shipler v. General Motors Corp., 710 N.W.2d 807 (Neb. 2006), the Nebraska Supreme Court interpreted a seat belt enactment similar to West Virginia. Shipler was a products liability and negligence lawsuit brought by a motor vehicle passenger rendered a quadriplegic in a rollover accident. The defendants were the vehicle's driver and its manufacturer. Neb. Rev. St. § 60-6,273, the applicable law, provided:

> Evidence that a person was not wearing an occupant protection system at the time he or she was injured shall not be admissible in regard to the issue of liability or proximate cause but may be admissible as evidence concerning mitigation of damages, except that it shall not reduce recovery for damages by more than five percent.

In Shipler, a jury verdict of more than $19.5 million was reduced by 5%, the statutory damages reduction to which the plaintiff agreed in mitigation as to whether she had misused the vehicle's seat belt. Regarding the Nebraska seat belt statute, the appellate court found that the

defendant auto manufacturer was "not prejudiced by the [trial] court's refusal to admit evidence of alleged seatbelt misuse. The defendant[] ...received the maximum benefit that § 60-6,273 allowed." Likewise, in the case *sub judice*, Appellant Ford received the maximum benefit that West Virginia Code § 17C-15-49(d) permitted – the five percent reduction in medical damages to which Teresa stipulated, pursuant to the statute's provisions making her seat belt non-use inadmissible in "any civil action."[27]

Ford does cite several cases which reveal that there is indeed a split of authority which is unhelpful for Ford under the Blankenship rule. See Rougeau v. Hyundai Motor America, 805 So.2d 147 (La. 2002) (quoting La.R.S. 32:295.1(E)); Estate of Hunter v. General Motors Corp., 729 So.2d 1264 (Miss. 1999) (quoting Miss. Code Ann. § 63-2-3)); Gardner By and Through Gardner v. Chrysler Corp., 89 F.3d 729 (10th Cir. 1996) (applying Kansas law) (quoting Kan. Stat. Ann. § 8-2504(c)); General Motors Corp. v. Wolhar, 686 A.2d 170 (Del. 1996) (quoting 21 Del.C. § 4802(I)); and DePaepe v. General Motors Corps., 33 F.3d 737 (7thCir. 1994) (applying Illinois law) (quoting 625 ILCS 5/12-603.1(c)). Albeit a primarily one-sided split in the cases cited by Ford they were decided by lower tribunals or contain statutory language different from West Virginia Code § 17C-15-49(d). This split of authority, however, merely adds further weight to Teresa's position, that under Blankenship, any split must be resolved in her favor, i.e. seat belt non-use evidence must remain inadmissible as long as the 5% statutory reduction is taken by stipulation as occurred here.

F. Under Rule 403 of the West Virginia Rules of Evidence, the Circuit Court Properly Excluded Evidence Regarding Seat Belts at the Trial of this Crashworthiness Case.

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[27] Although not meeting the Blankenship "split of authority" test, because they were decided by lower level courts, other cases held a plaintiff's seat belt non-use to be inadmissible under state statutes incorporating a "gag rule" against such evidence. They include Mott v. Sun Country Garden Products, Inc., 901 P.2d 192 (N.M. App. 1995) (quoting NMSA 1978 § 66-7-373(A), and Anker v. Little, 541 N.W.2d 333 (Minn. App. 1995 (quoting Minn. Stat. §69.685(4)), which precludes introduction of seat belt evidence for any purpose whatsoever).

The evidence sought to be admitted by Ford, Teresa's non-use of a seat belt, was not only barred by the statutory and common law of this state, it was also barred by West Virginia Rule of Evidence 403. This Court recognized in Smith v. First Community Bancshares, Inc., 212 W. Va. 809, 823, 575 S.E2d 419, 433 (2002), that

> '[r]ules 402 and 403 of the West Virginia Rules of Evidence [1985] direct the trial judge to admit relevant evidence but to exclude evidence whose probative value is substantially outweighed by the danger of unfair prejudice ...' Syllabus Point 4, Gable v. Kroger Co., 186 W.Va. 62, 410 S.E.2d 701 (1991). Further,
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> The West Virginia Rules of Evidence allocate... significant discretion to the trial court in making evidentiary... rulings. Thus, rulings on the admissibility of evidence are committed to the sound discretion of the trial court. Absent a few exceptions, this Court will review evidentiary...rulings of the circuit court under an abuse of discretion standard.
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> Syllabus Point 1, in part, McDougal v. McCammon, 193 W.Va. 229, 455 S.E.2d 788 (1995).

In Ulm v. Ford Motor Co., 750 A.2d 981 (Vt. 2000), the Vermont Supreme Court relied on the counterpart to W.V.R.E. Rule 403 in upholding the trial tribunal's refusal to admit evidence of the plaintiff's seat belt non-use. V.R.E. Rule 403 is worded identically to the West Virginia evidence rule bearing the same number. Both rules state in pertinent part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ..." The Vermont appellate court found: "The court has broad discretion in determining whether the probative value of relevant evidence outweighs any prejudicial effect. The burden of showing abuse of discretion is a heavy one. That burden has not been met here." (internal citations omitted). The same is true in the case at bar.

Accordingly, even if as Ford alleges, there was no true statutory bar to the seat belt non-use evidence if sought to admit, such evidence would still be barred by Rule 403. Thus, the lower court acted within the scope of Rule 402 and 403 which it excluded seat belt evidence at the trial of the present case. Introduction of that evidence would have unavoidably confused and misled the jurors

as to the purposes for which they could consider such information. As discussed above, West Virginia Code § 17C-15-49(d) prohibits evidence of seat belt non-use from ever being admitted on negligence and mitigation of damages issues in any civil action. Such evidence was also inadmissible in the case sub judice as to causation. This was true because the Appellee stipulated to a five percent (5%) in her medical damages under the statute. Jurors would inevitably encounter great difficult in trying to disregard seat belt non-use evidence for all of the foregoing purposes, while weighing it only as to the alleged design defect in a crashworthiness case such as this one. The trial court's pre-trial ruling properly avoided the substantial prejudice that Teresa would have suffered from the admission of such evidence. Finally, the election to admit evidence of non use rests with the defendant if a defendant contends this failure was a proximate cause of the injuries.

G. The Circuit Court Did Not Deprive Ford of any Due Process Rights By Excluding Evidence of Seat Belt Non Use.

Finally, providing no pertinent analysis, Ford argues without legal support that the trial court deprived it of due process by applying West Virginia Code § 17C-15-49 to exclude evidence of Teresa's non-use of a seatbelt. To the contrary, despite Ford's broad and unsupported assertions, most, if not all, of the courts that have addressed this issue have held that no due process concerns are violated in upholding statutory bans on the admissibility of seat belt non-use evidence. Ford's arguments on this point are more notable for absence of any authority than for providing any precedent to follow. See, Huff v. Shumate, 360 F.Supp.2d 1197 (D. Wyo. 2004) (quoting Wyo.Stat.Ann. § 31-5-1402(f)) ; Mott v. Sun Country Garden Products, Inc., 901 P.2d 192 (N.M.App. 1995) (quoting NMSA 1978 § 66-7-373(A)); Ryan v. Gold Cross Services, Inc., 903 P.2d 423 (Utah 1995) (quoting Utah Code Ann. § 41-6-186, renumbered as § 41-6a-1086 by Laws 2005, c. 2, § 238, eff. Feb. 2, 2005); C.W. Matthews Contracting Co., Inc., v. Gover, 428 S.E.2d 796 (Ga. 1993) (quoting O.C.G.A. § 40-8-76.1); and Bendner v. Carr, 532 N.E.2d 178 (Ohio App. 1987)

(quoting Ohio Rev. Code §§ 4513.263, 4513.263(B, G) (G)(1)).

In a well analyzed opinion, Huff v. Shumate, 360 F.Supp. 2d 1197 (D. Wyo. 2004), the federal district court for the District of Wyoming addressed a due process challenge to a state seat belt statute. The challenge in Huff arose from an automobile personal injury action in which the plaintiff moved in limine to exclude evidence of non-use of a seat belt. The trial court addressed the constitutionality of Wyo. State. Ann. § 31-5-1402(f), a statute similar to but even more succinct than West Virginia Code § 17C-15-49(d). The Wyoming act stated: "Evidence of a person's failure to wear a safety belt as required by this act shall not be admissible in any civil action."

The Court determined, as reported in, "The Viability of 'The Seatbelt Defense' in Wyoming – Implications of and Issues Surrounding Wyoming Statute § 31-5-1402(F)," 5 Wyo. L. Rev. 133 (2005), that a vehicle manufacturer's procedural or substantive due process rights are **not** violated by the exclusion of seat belt non-use evidence. Id. at 146-52, 204-06.

West Virginia and other courts in addressing this issue would likely reach the same result as the Huff court as the Supreme Court of Appeals of West Virginia has repeatedly noted that the basic calculus involves determining whether "the means chosen by the Legislature to achieve a particular legislative purpose bear a rational relationship to that purpose and are not arbitrary or discriminatory. (citation omitted.)." Thorne v. Roush, 164 W. Va. 165, 167, 261 S.E.2d 72, 74 (1979). Thus, the Supreme Court of Appeals of West Virginia further elaborated in DeCoals, Inc., v. Board of Zoning Appeals, 168 W. Va. 339, 341, 284 S.E.2d 856, 858 (1981):[28]

> Substantive due process considerations require legislation to be reasonable–to be substantially related to a legitimate goal. One of the government's primary purposes is protecting its constituency. 'Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power.' (internal citation omitted). If the end is

[28] Ford's argument on this issue is revealing in what it does not disclose. It cites no decision on the relevant due process issue, principally, it appears because all extant authorities hold against it.

legitimate, our inquiry is limited to whether the means are substantially related to that end. **It is not ours to judge the wisdom or efficacy of those chosen means.** (emphasis added).

In this case, the legislature goal is legitimate. As discussed in "The Viability of 'The Seatbelt Defense' in Wyoming – Implications of and Issues Surrounding Wyoming Statute § 31-5-1402(F)," 5 Wyo. L. Rev. 133 (2005), the legislative interest in passing "evidence of non-use litigation" is often to maintain efficient trials, free from complicated testimony on the mitigating effects of seat belt use. The legislative interest might also lie in encouraging automotive manufacturers to account for that section of the populace that does not utilize seat belts. Both of these legislative interests are legitimate. Therefore, this Court's only question is whether the means are substantially related to that end. In this case, they are. West Virginia Code § 17C-15-49, with its mandatory 5% penalty acts as both a way to motivate automotive manufacturers to make safe vehicles and a way to make trials more efficient. Therefore, Ford's due process argument fails.

II. THE CIRCUIT COURT CORRECTLY DENIED FORD'S MOTION FOR JUDGMENT AS A MATTER OF LAW BECAUSE TERESA PROVED BY A PREPONDERANCE OF THE EVIDENCE THAT THE FORD RANGER AIRBAG SYSTEM WAS DEFECTIVE.

A. The Standard of Review Mandates that All Evidence Must Be Analyzed in the Light Most Favorable to Teresa.

West Virginia law holds that:

> [I] n reviewing a trial court's ruling on a motion for a judgment notwithstanding the verdict (Rule 50(b)) it is not the task of the appellate court reviewing the facts to determine how it would have ruled on the evidence presented. It's task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, in ruling on a motion for a judgment notwithstanding the verdict, the evidence must be viewed in the light most favorable to the non-moving party.[29]

Rodriguez v. Consolidated Coal Co., 206 W. Va. 317, 325, 524 S.E.2d 672, 680 (1999). Thus,

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[29]The standard remains the same although Rule 50 is now referenced as judgment as a matter of law rather than the former practice of judgment notwithstanding the verdict following the 1998 amendment. See Arbogast v. Mid-Ohio Valley Medical Corp, 214 W. Va. 356, 589 S.E.2d 498 (fn 1) (2003).

Ford's argument must be examined with all facts construed, as the jury construed them, in favor of Teresa.

B. The Weight of the Evidence Supports the Verdict that Ford's Airbag System Was Defective.

"The cause of action covered by the term 'strict liability in tort' is designed to relieve the plaintiff from proving that the manufacturer was negligent in some particular fashion during the manufacturing process and to permit proof of the defective condition of the product as the principal basis of liability." See Syl. pt. 3, Morningstar v. Black and Decker Mfg. Co., 162 W. Va. 857. 253 S.E.2d 666 (1979). Thus, "[o]nce it can be shown that the product was defective when it left the manufacturer and that the defect proximately caused the plaintiff's injury, a recovery is warranted absent some conduct on the part of the plaintiff that may bar his recovery."[30] See id. 162 W. Va. at 883, 253 S.E.2d at 680.

In this case, it was established at trial that the product was defective when it left the manufacturer. Specifically, Teresa's expert witness in the field of engineering, Gary Derian, P.E., testified, and the jury accepted, that, by automotive industry standards, an airbag is expected to deploy in any severe crash, i.e. any crash where there is a greater than twenty-five percent (25%) risk of serious injury or death to the occupants of the motor vehicle. Furthermore, he provided a detailed explanation that this airbag was defective. Specifically, he testified that even based on Ford's standards the driver side airbag was defective. More to the point in a barrier crash airbags must by Ford's standards deploy when the velocity change is 14 mph or greater. Here, Mr. Derian testified that the change of velocity was between 15 and 18 mph. Additionally, the crash into the tree also resembled a pole crash. Mr. Derian explained that the G pulse, as reported in Ford's own crash test

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[30] No one, including Ford, has ever alleged that Teresa was in any way at fault for her vehicle's airbag failure.

results the measure of crash severity is even more severe in a 19 mph pole crash than in a 14 mph barrier crash. Nonetheless, Ford accepted as Mr. Derian characterized the gap protection in a pole crash by requiring a higher deployment threshold. Needless to say, to the extent the crash resembled a barrier crash, the failure to deploy is a textbook illustration of a defective product. Further, Mr. Derian relied on widely published and reliable automobile literature mostly in SAE papers criticizing the single point sensor in a pole crash. The burst fracture she sustained is unmistakable evidence of the severity of that crash. (Derian Vol. III, 114) Mr. Derian further testified, and the jury agreed, that the crash at issue was severe. (Derian Vol. III, 114). Further, it is undisputed that Teresa's airbag did not deploy. Therefore, the Ford Ranger at issue must be considered defective because its airbag failed to deploy in this severe crash whether described as a barrier crash or a pole crash or a combination of both. Additionally, crash severity as determined by Ford's own standards show that the change in velocity which occurred in the crash required mandatory airbag deployment.

Ford's argument that Mr. Derian's testimony omitted a critical risk utility argument is as misleading as it is dead wrong. In Morningstar, the Court explained:

> "We believe that a risk utility analysis does have a place in tort product liability cases by setting the general contours of relevant expert testimony concerning the defectiveness of a product."
>
> "Through his testimony, the jury is able to evaluate the complex technical problems relating to product failure, the adequacy of warnings and labels, as they relate to economic costs. In effect, the expert explains to the jury the risk/utility standards, and gives the jury reasons why the product does or does not meet such standards which are essentially standards of product safeness."

Mr. Derian, in his testimony explaining the defective airbag which failed to deploy when the Ford Ranger crashed into the maple tree and experienced a change in velocity of between 15 and 18 mph, satisfied every applicable requirement of Morningstar's risk/utility analysis. First, it should be noted the product in question is an airbag system. Most people including Teresa Estep, expect

that when they experience a crash of this severity, their airbag will deploy. Teresa's injuries also demonstrate the severity of the crash. Mr. Derian carefully explained that the automotive literature in the published SAE papers, Ford's own test results and the dynamics of this crash all show that the single point sensor, is prone to fail in a pole crash. It is too distant from the front bumper impact to effectively deploy the airbag in a pole crash, and as a barrier crash it failed to deploy at all when the severity was measured as a change of velocity of between 15 and 18 mph.

Ford itself, abandoned the front bumper sensor the same year as this Ranger was produced. Ford's better idea of a single point sensor located near the radio in the dashboard was a bad idea. Ford knew of its gap in protection caused by this single point sensor which was in its first year of production. Clearly, Ford had not yet worked out the "bugs". Other manufacturers including Ford used the front bumper sensor. There is no risk/utility benefit for Teresa Estep to be used as a guinea pig for a sensor device that was not ready for prime time. The record amply shows Mr Derian satisfied the risk/utility analysis in his analysis and in his testimony. His reconstruction of the crash was reliable. The Ford did not fly - no law of physics supports Ford's airborne theory. Mr. Derian explained reasons for his opinions. The jury was told of the date when Mr. Derian made his site inspection and of his concurrence with Ford's measurements and that he disagreed with Ford's conclusion that the Ranger flew like a bullet before and after striking the tree when it almost stopped. Finally, Mr. Derian explained the safer alternative design and why this single point sensor design failed when elements of a barrier crash and pole crash were combined in this crash.

Ford snipes repeatedly about the level of analysis Mr. Derian performed. That failed as a defense tactic at trial and it is less availing as an appellate argument. For example, were one to read Ford's argument and not the trial transcript, it would not be possible to learn that Mr. Derian knew and testified the 14.2 mph barrier crash test and the 19.2 mph 8" pole crash test were conducted by

Ford (Derian Vol. III, 130), and Ford's standard required airbag deployment at those changes in velocity and the airbag failed to deploy. Mr. Derian carefully analyzed the G pulses reported in those test results (Derian Vol. III, 132). He was critical of the time delay for deployment of the airbag in the pole crash pulse which was a more severe crash than the barrier crash by Ford's own records (Derian Vol. III, 135, 136, 137). He was critical that whether characterized as a barrier crash or as a pole crash the airbag failed to deploy. The jury could base its verdict on one or the other or on both criticisms.

The airbag in this Ford Ranger did not deploy in a frontal crash in which the vehicle experienced a change in velocity of 15 to 18 mph when the airbag was required by Ford's own standards to deploy at 14 mph change in velocity. In face of the obvious, Ford tries to say Teresa failed to prove a defect. That is not what the jury or the trial court say. The jury inspected the truck and the scene and the bent steering wheel and was provided multiple photographs. Ford argued that its product was safe and its airbag would deploy in a barrier crash of 14 mph or greater. It offered evidence rejected by the jury that the change of velocity was less than 14 mph (Kent Vol. V pg. 123-125. In fact, the jury rejected the Kent testimony and believed Mr. Derian. That is proper. Here, the front bumper crush depth resembled a barrier crash, the crush depth was in the same 4" to 8" depth range where the tree was struck by tow hooks, the strongest part of the frame. So, there was ample evidence for the jury to determine in its verdict the protection required to be afforded in a barrier crash did not exist and that the single point sensor did not deploy as is mandatory when the change in velocity is 14 mph. There is also ample evidence to show this was a pole crash in which the sensor failed to detect the severity of the crash. Needless to say if Ford's expert Mr. Kent offered an opinion as to the lesser change in velocity the jury was free to reject that testimony.

C. Gary Derian Shows that a Risk/Utility Analysis Proves Ford's Airbag System Was Defective.

In Morningstar the Court drew upon the risk utility analysis approach proposed by Deans Prosser and Wade, 162 W. Va. at 886, 253 S.E.2d at 681 (fn 20). Ford's attempt to place that analysis before this Court is awkward at best, unavailing at worst. There is no explanation of how the risk utility analysis failed to measure up to Morningstar. Very simply, Ford had a better idea, i.e., a safe airbag deployment sensor system, then changed to the single point sensor system creating a gap in protection for which the jury held it responsible. Teresa paid for Ford's technology which was not ready to protect her.

Moreover, Ford's clumsy attempt to place a risk/utility analysis before the Court totally ignores the risk/utility analysis which Mr. Derian performed and to which he testified.[31] Mr. Derian testified that the 1999 Ford Ranger's airbag was defective (i.e. risky) because the single point sensor responsible for deploying the airbag was not designed to deploy the airbag in a pole crash, like the crash Teresa was involved in, until the vehicle reached a speed greater than a speed where serious injury could occur. (Derian 140,145). Mr. Derian also testified that an affordable remedy existed to correct this defect - front sensors. Mr. Derian informed the jury that Ford had utilized front sensors in previous versions of the Ford Ranger, but had stopped using front sensors prior to the 1999 model year.[32] (Derian 147-148). Thus, despite Ford's vague assertions to the contrary, Mr.

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[31] Mr. Derian firmly expresses the following opinions and the basis for those opinions, which Ford conveniently omits or misrepresents in its Brief. Mr. Derian testified:

> "... the data tells me that the design of the system in this truck does not protect the occupant from pole crashes or I should say that there's a gap in the protection. There's a certain speed range in a pole crash which is severe enough to cause injury, severe injury, yet not severe enough to cause the airbag to deploy because the airbag sensor - the way its designed and the way its located in this truck is blind to the G pulse of the pole impact."

> "... it is well recognized in the industry by experts that this type of sensing system is blind to this type of a crash - a pole crash in this speed range."

[32] Mr. Derian also testified about how Ford is not alone in knowing to provide adequate protection for its customers in a pole crash. Rather, all manufacturers know about the sensor's blind spot (Derian Vol. III, 144).

Derian explained to the jury specific reasons why the 1999 Ford Ranger's airbag system was defective and what Ford could have done, had it so decided to protect its customers, to reasonably and inexpensively fix the problem[33].

III. THE JURY'S DECISION WAS BASED ON THE WEIGHT OF THE EVIDENCE AND SHOULD NOT BE DISTURBED.

A. The Standard of Review Affords The Jury's Decision Deference.

A motion for judgment must review the evidence in a light most favorable to the non-moving party. See Syl. pt. 3, Alkire v. First National Bank, 197 W. Va. 122, 475 S.E.2d 122 (1996). Moreover, in its review, the Court must "[1] assume that all conflicts in evidence were resolved by the jury in favor of the prevailing party; [2] assume as proved all facts which the prevailing party's evidence tends to prove; and [3] give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved." See Syl. pt. 5, Orr v. Crowder, 173 W. Va. 335, 315 S.E.2d 593 (1983). Finally,

> In reviewing a trial court's granting of a motion for judgment as a matter of law, it is not the task of the appellate court to determine how it would have ruled on the evidence presented. Its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. See Syl. pt. 2, Alkire, 197 W. Va. 122, 475 S.E.2d 122.

B. The Testimony from Mari Turman Established a Solid Basis for Causation.

At trial, the jury was asked to determine what was "a cause" of Teresa's injuries. West Virginia law recognizes no requirement to prove the cause. Rather, proof of a proximate cause is required Mays v. Chang, 213 W. Va. 220, 224, 579 S.E.2d 561, 565 (2003). The jury clearly determined that the steering wheel whether or not it was bent trapped the bottom part of Teresa's

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[33] Of course, assuming the jury believed this was a classic barrier crash then the failure of the airbag to deploy when the change of velocity exceeds 14 mph is a solid bases to find the airbag defect.

body, causing Teresa's upper body to "just whip[] right over [the steering wheel]."[34] (Truman, Vol. IV. 128). The jury further found, that a properly deployed airbag would have prevented Teresa's injuries. (Truman, Vol. IV, 141). The jury clearly found that there was a causal link between the defective product, the 1999 Ford Ranger's airbag and the plaintiff's injuries. Accordingly, Morningstar's requirements were satisfied and the Circuit Court's order denying judgment as a matter of law was appropriate. See Syl. pt. 7, Morningstar, 162 W. Va. 857, 253 S.E.2d 666.

In arguing that the Circuit Court's ruling was improper, Ford asks this Court to ignore the jury's findings simply because Ford believes that one of the many pieces of evidence the jury considered, the shape of the steering wheel, was wrongly understood by the jury.[35] Ford's argument, however, overlooks a number of important facts. First, Ford overlooks the fact that at trial, Mari Turman did not just rely on the bend in the steering wheel. Rather, Mari Turman presented evidence describing Teresa's serious spinal injury, bruises on her thigh, particularly was the inside area, damage to the right knee bolster of her Ford Ranger, and the bend in the frame of the steering wheel. All of these pieces of evidence were considered by Mari Truman, in testifying to her opinion.[36] Further, all of these pieces of evidence pointed directly to the fact that Teresa's body was thrown up and over the steering wheel when the Ford Ranger crashed into the maple tree, causing the specific burst fracture, when her airbag did not deploy. (Truman 127). It is particularly noteworthy that Dr. Schmidt, a highly qualified neurosurgeon, and who treated Teresa, concurs with Ms.

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[34] This "sudden deceleration is the kind of injury that creates that kind of – what the doctor said, a burst fracture." (Truman Vol. IV, 128)

[35] Ford offers a picture of an exemplar steering wheel and the actual steering wheel at issue in support of this argument. Yet, even in Ford's picture, the two steering wheels appear to differ. In any event, what Ford demands is the classic substitution by an appeal court for a jury of finding of fact.

[36] Ford attempted to make Ms. Truman say at trial that steering wheel damage was a significant part of the facts used in coming to her opinion, but Ms. Truman maintained, despite the picture Ford paints to the contrary in its brief, that the steering wheel bend was only "relatively" important. (Truman Vol. IV, 169).

Truman's explanation concerning a concussion would only occur if her head struck the windshield and that could only occur if she moved up and forward as Mari Truman described in her testimony. Most notably, Ms. Truman described the crash into the maple tree as causing the "big spinal injury" and exercising its intelligence the jury requested Ford's airborne dropped into the river theory to explain that injuty.

Further, the jury was not only heard evidence from Ms. Truman in making its decision, it also considered a host of other factors. These factors included, but were not limited to: the testimony of Teresa's other witnesses and the jury's viewing of the accident scene and the Ford Ranger. It was from these factors that the jury could and did determine that Teresa's Ford Ranger rolled on its wheels down the hill, stuck the tree, pivoted and rolled into the water. The most severe impact and damage both to the truck and to Teresa occurred at the maple tree. Thus, the jury determined the quintessential question of fact - that the truck rolled on its wheels, downhill rather than flew into the river and the injury occurred from striking the tree without protection of the airbag.

Yes, one of the facts that may have been considered by the jury was whether the steering wheel of Teresa's vehicle was bent. The bend in the steering wheel, however, was not the silver bullet holding Teresa's case together as Ford would like for this Court to believe and as the jury rejected. It is merely one piece of evidence, which the jury may or may not have considered in reaching its conclusion. Finally, it must be remembered that if the jury did consider any bend in the steering wheel as part of its analysis, it did so after hearing evidence from both sides regarding whether the steering wheel was bent, evaluating this evidence, and coming to a decision regarding the weight to afford this evidence and for which there is none than sufficient evidence to suppose the decision.

IV. THE TRIAL COURT'S PROPER RELIANCE ON WEST VIRGINIA LAW IN REFUSING TO GIVE A PROFERRED JURY INSTRUCTION SHOULD NOT BE

OVERTURNED AND CANNOT BE OVERTURNED ABSENT AN ABUSE OF DISCRETION BY THE TRIAL COURT

A. The Appropriate Standard of Review of A Trial Court's Refusal to Give a Proferred Jury Instruction is Abuse of Discretion.

As the Court has said on previous occasions:

> A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

See Syl. pt. 3, State v. Lease, 196 W. Va. 318, 472 S.E.2d 59 (1996) (citing, Syl. pt. 4, State v.Guthrie, 194 W. Va. 657, 461 S.E.2d 163 (1995).

In this case, the charge accurately reflected the law. This is because not even Ford maintains that the Court's instruction was in any way non-compliant with the rule of law set forth in Johnson v. General Motors Corp., 190 W. Va. 236, 247, 438 S.E.2d 28, 39 (1993). Therefore, failure to give Ford's proposed instruction can only be analyzed under an abuse of discretion standard.

B. The Standard Set in Johnson v. General Motors Corp., 190 W. Va. 236, 247, 438 S.E.2d 28, 39 (1993), Is the Law of This State and Must Be Followed.

In making its argument, Ford relies entirely on out-of-state cases and pays little to no accord to Johnson v. General Motors Corp., 190 W. Va. 236, 247, 438 S.E.2d 28, 39 (1993), the West Virginia case which is dispositive on the issue of whether the jury should have been instructed as to the effect of compliance with federal motor vehicle safety standards.[37]

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[37] Ford's argument that it was an error for the Circuit Court to give an instruction telling the jury that compliance with the federal motor vehicle safety standard creates a rebuttable presumption that the product is safe is completely at odds with West Virginia jurisprudence, not only in Johnson, supra, but also in Miller v. Warren, 182 W. Va. 560, 390 S.E.2d 207 (1990). There the Circuit Court instructed the jury that defendant's compliance with a fire code meets the standard of care and duty required. The Court explained, carefully, that while failure to comply with a safety regulation constitutes a presumption of negligence if an injury naturally flows from such non-compliance, because that sort of regulation is intended to prevent an injury, the converse is not true.

Then, the Court explained the offending instruction in Miller created a rebuttable presumption that

Thus, as is readily apparent from a reading of the above jury instructions, the Court, in crafting its instructions in this case, complied with West Virginia law. Accordingly, its formulation of its jury charge should not be disturbed.

A close examination, however, of the cases cited by Ford makes it even more clear that the circuit court did not err in formulating its jury charge.[38] That is because even those cases make it clear that, in the jurisdictions from which they derive, the instruction sought by Ford must be considered improper when the defendant knows of other risks not contemplated by the regulation.[39] See e.g. Jones v. Hittle, 549 P.2d 1383, 1389-90 (Kan. 1976). In this case, Ford was well aware of the fact that the airbag-deployment sensors contained in the 1999 Ford Ranger were "blind to this type of crash - a pole crash in this speed range." (Derian, 140). Accordingly, even the cases upon which Ford relies would not give the instruction Ford seeks in this situation.

C. The Model Instructions Are Not the Law Of this State.

Ford has produced no authority stating or even inferring that the model jury instructions promulgated by this Court, which by their very terms are not are based not on West Virginia law, are to be considered the law of this state. In fact, Ford's reliance on Geier v. American Honda Motor

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compliance with a regulation constitutes due care and it was error to so instruct the jury. The Court further explained, "[c]ertainly, compliance with regulations is relevant evidence of due care, and the jury should be told that. But since evidence does not have behind it any of the weight of a presumption." Miller, 182 W. Va. at 562, 390 S.E.2d at 209. The instruction here complies with West Virginia law. (Emphasis added).

Essentially, Ford advocates that compliance with a federal regulatory standard should change our common law simply because it is a regulatory standard. Geier, nor any other product liability decision states that principle. This Court in both Johnson and Miller reached the right decision, "It is settled law that a statute or regulation merely sets a floor of due care. Restatement (Second) of Torts § 288C (1995); Prosser and Keaton on Torts, 233 (5th Ed. 1984)." 390 S.E.2d at 209.

[38] This is also due to the fact that the Circuit Court's instruction was in compliance with the National Traffic and Motor Vehicle Safety Act of 1966 which, by its own terms, is not controlling of state law. See National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718.

[39] West Virginia law also applies this premise, holding, that "[c]ircumstances may require greater care, if a defendant knows or should know of other risks not contemplated by the regulation." See Miller, 182 W. Va. at 562, 390 S.E.2d at 209 (1990).

Co., Inc., 529 U.S. 861 (2000) is puzzling. Geier, is a preemption decision that has nothing to do with an instruction.[40] Geier, a 5 to 4 decision, only held that a decision by a car manufacturer to install either an airbag or an automatic seat belt was controlled by a federal regulation so the manufacturer could not be subject to a common law damage action for making that decision.

Geier has limited applicability and only in the area of conflict preemption. Preemption is not and never was an issue here. Ford strains to fashion an argument a regulatory standard changes West Virginia, or for that matter, common law of every state. That is not the holding in Geier, nor can compliance with a federal regulatory standard succeed as a defense to those principles stated by this Court in Johnson.

Further, to read Ford's Brief, it would appear Ford was deprived of any opportunity at all to instruct on regulatory compliance. This is not true. Ford's experts testified extensively on the fact that Ford had complied with all state and federal laws and regulations in designing the 1999 Ford Ranger's airbag sensor system. Also, Ford had the benefit of an instruction based on Johnson which is unquestionably an accurate statement of West Virginia law.

This Court has addressed whether model instructions are to be considered the law of this state, and has, in all instances ruled that the model instructions did not need to be followed so long as the jury was, as it was here by the Johnson instruction, alerted to the controverted issue. Specifically, in State v. Gravely, 171 W. Va. 428, 438-39, 299 S.E.2d 375, 386 (1982), the Court declined to mandate use of a model instruction in a criminal case.[41] Further, in Stone v. United

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[40] Decisions of the United States Supreme Court, while persuasive, are not binding on West Virginia courts. See e.g. Brooks v. Isinghood, 213 W. Va. 675, 682, 584 S.E.2d 531, 538 (2003); Cattrell Companies, Inc. v. Carlton, Inc., 217 W. Va. 1, 8, FN21, 614 S.E.2d 1, 8 (2005); The Hardwood Group v. LaRocco, 219 W. Va. 56, 61, FN6, 631 S.E.2d 614, 619 (2006); TXO Production Corp. v. Alliance Resources Corp., 187 W. Va. 457, 470, 419 S.E.2d 870, 883 (1992).

[41] The proposed model instruction came from the federal courts, but had been applied by numerous state courts.

Engineering, A Div. of Wean, Inc., 197 W. Va. 347, 360, 475 S.E.2d 439, 452 (1996), the Court rejected adopting model instructions based on the Restatement (Second) of Torts.

Ford's argument presents no reason to reverse or modify the long controlling law of this state as set forth in Johnson, which Ford was afforded the benefit. Accordingly, Ford's fourth and final assignment of error must be denied.

CONCLUSION

For the foregoing reasons and authorities the judgment of the Circuit Court of McDowell County, West Virginia must be affirmed.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 33810

TERESA ESTEP,

Appellee,

v.

FORD MOTOR COMPANY,
a foreign corporation doing business in West Virginia and
MIKE FERRELL FORD LINCOLN-MERCURY, INC., a West Virginia corporation,

Appellants.

CERTIFICATE OF SERVICE

I, Guy R. Bucci, do hereby certify that the foregoing, **Brief of Appellees Teresa Estep and Terry Estep,** have been served upon counsel of record by hand delivering a true and exact copy on this the **27th** day of **June, 2008** as follows:

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